92-1147

NO.

Supreme Court, U.S.
FILED
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

NWABUEZE V. OKOCHA,

Petitioner

versus

CASE WESTERN RESERVE UNIVERSITY, et al.

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the United States District Court For The Northern District Of Ohio commit prejudicial error, undermine the integrity of and public confidence in the federal judicial system, and deny petitioner due process of law by adopting a standard, under Fed. R. 56, which contravenes the express language and spirit of the Federal Civil Rules?

LISTING OF ADDITIONAL PARTIES NOT APPEARING

ON THE COVER PAGE

DR. JACK L. KOENIG

DR. JEROME B. LANDO

DR. HUGH BROWN

DR. LUCILLE S. MAYNE

ALLEN HOLMES

DR. DAVID V. RAGONE

INDIVIDUALLY AND IN THEIR

OFFICIAL CAPACITIES

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DID THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO COMMIT PREJUDICIAL ERROR, UNDERMINE THE INTEGRITY OF AND PUBLIC CONFIDENCE IN THE FEDERAL JUDICIAL SYSTEM, AND DENY PETITIONER DUE PROCESS OF LAW BY ADOPTING A STANDARD, UNDER FED. R. 56, WHICH CONTRAVENES THE EXPRESS LANGUAGE AND SPIRIT OF THE FEDERAL CIVIL RULES?

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DECISIONS BELOW

The decision of the United States Court Of Appeals For The Sixth Circuit denying petitioner's Petition For Rehearing And Rehearing En Banc is unreported and is reproduced in the Appendix as A-1. The decision of the United States Court Of Appeals For The Sixth Circuit affirming the decision of the United States District Court For The Northern District Of Ohio is reproduced in the Appendix as A-2. The decision of the United States District Court For The Northern District Of Ohio, Eastern Division is unreported and is reproduced in the Appendix as A-3.

JURISDICTION

The United States Court Of Appeals For The Sixth Circuit denied petitioner's Petition For Rehearing And Rehearing En Banc on August 28, 1992. Jurisdiction is conferred by 28 U.S.C. Section 1254.

CONSTITUTIONAL AND STATE RULE PROVISIONS INVOLVED

Amendment XIV to the United States Constitution:

> **Section 1.** All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Federal Civil Rule 56 (c):

> (c) **Motion and Proceedings Thereon.** The motion shall be served at least 10 days before the time fixing for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

Federal Civil Rule 56 (e):

(e) **Form of Affidavits; Further Testimony; Defense Required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto and served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment if appropriate, shall be entered against the adverse party.

(f) **When Affidavits Are Unavailable.** Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

STATEMENT OF THE CASE

Petitioner was a student studying for his doctorate at respondent, Case Western Reserve University. After his unwarranted dismissal from the university, Petitioner filed an action against the respondents alleging discriminatory practices based on his race and national origin.

After the parties engaged in preliminary discovery, on February 17, 1987, the respondents filed their Motion For Summary Judgment. On March 6, 1987, petitioner filed a motion requesting additional time to respond to the pending Motion For Summary Judgment.

On March 9, 1987, petitioner's former counsel filed his Notice of Withdrawal. On April 3, 1987, new counsel filed their Entry Of Appearance Of Co-Counsel. This was the first involvement that petitioner's new counsel had in the case.

Prior to the change of counsel, the district court had set a discovery cut off of April 27, 1987. On April 27, 1987, petitioner's new counsel filed a motion to extend the discovery cut-off and for additional time to respond to the pending motion for summary judgment.

Petitioner premised his motion upon the need to take several depositions of the individual respondents and key witnesses. Two of the respondents/potential deponents were professors at respondent Case Western Reserve University who, by April, 1987, had traveled out of Ohio for Summer vacation. They were not scheduled to return until late in the Summer. Thus, petitioner requested that he be given until August 31, 1987 by or before which to take said depositions and to respond to the pending motion for summary judgment.

Even though the respondents filed no response, the district court never ruled on this motion. Meanwhile, the respondents' counsel refused to produce the respondents for deposition, noting the expiration of the April 27, 1987 discovery cut-off set by the district court.

After the district court failed to rule on the motion for nearly seven months, the petitioner, on November 12, 1987, filed another motion to extend the discovery cut-off deadline and for additional time to respond to the motion for summary judgment. Finally, on or about November 30, 1987, the district court granted petitioner until December 11, 1987, by or before which to schedule, prepare to take, and to take the necessary depositions, to have them transcribed, to allow the deponents thirty (30) days under Fed. R. 30 (e) to review and sign the deposition

transcripts, to review and outline the thousands of pages of technical, scientific deposition testimony, and to prepare and to file a proper response to the motion for summary judgment. This, of course, the district court knew would be impossible.

To complicate matters further, on December 7, 1987, respondents filed a motion for a protective order. In stark contrast to the seven months which it took for the district court to address petitioner's two motions to extend the discovery cut-off, the district court, on December 9, 1987, conducted a discovery conference to resolve the motion for protective order and to address another dispute over respondents' refusal to provide petitioner certain financial aid records of other foreign graduate students

studying in petitioner's department at the university.

On December 10, 1987, the district court entered an order granting petitioner until December 24, 1987, by or before which to take the depositions necessary to respond to the motion for summary judgment, and until February 29, 1988, by or before which to file his response to the pending motion for summary judgment. On January 28, 1988, the district court resolved the final discovery dispute when it ordered that petitioner be denied access to the financial aid records.

From December 2, 1987 until December 24, 1987, petitioner worked feverishly noticing, preparing for, and taking the depositions of Jack L. Koenig, Jerome B. Lando, Hugh Brown, Barbara Leach, Jean Starky, and Gerhard Welsch. These depositions were extremely lengthy and

involved complex scientific subject matter and terminology.

On February 29, 1988, petitioner filed a Motion For Extension Of Time, under Fed. R. Civ. P. 56 (f) and 6 (b), to respond to the pending Motion For Summary Judgment. The bases of the motion were that petitioner did not receive the deposition transcripts of two of the deponents until February 28, 1988, that another transcript had not yet been completed, that none of the deponents had reviewed or signed their transcripts, that none of the deposition transcripts could at that time be filed in response to the motion for summary judgment, and that the deposition testimony was essential to prepare and to present a meaningful response to the pending motion for summary judgment.

In support of the motion, petitioner attached as an exhibit an affidavit from

Ms. Linda Jones, the owner and manager of the small court reporter firm responsible for transcribing these depositions, in which she averred that she had delivered two of the depositions to petitioner late in the evening on February 28, 1988 and that she would be able to complete the transcription of the final deposition within fifteen (15) days. Petitioner also attached an affidavit from one of his attorneys, in which it was averred that these deposition transcripts were necessary to file a meaningful response to the motion for summary judgment.

On the following day, March 1, 1988, the district court, without comment, without considering respondents' objections, and in a marginal entry, denied petitioner's motion for extension of time to respond to the pending motion for summary judgment.

On September 12, 1991, the district court

granted respondents' Motion For Summary Judgment. In its written opinion, the district court granted summary judgment as to several of the counts alleged in petitioner's Amended Complaint on grounds which were different from those asserted by respondents in the motion for summary judgment.

On July 13, 1992, the Court of Appeals For The Sixth Circuit affirmed the district court's decision in a three page, one-half sentence written opinion which was totally devoid of any citation to supportive case law, statutes, civil rules, or constitutional provisions. On August 28, 1992, the Sixth Circuit denied petitioner's Motion For Rehearing and Rehearing En Banc. In embracing a standard which turns Fed. R. 56 on its ear and forces attorneys to engage in unethical behavior, the Court of Appeals reasoned,

> Plaintiff argues that his response to defendants' motion could not be completed without these transcripts. Plaintiff's counsel was present at these depositions. **Yet plaintiff did not file any response, which could have included counsel's affidavit stating the substance of the testimony that was given, even though he could not cite to specific transcript pages.**
>
> ...
>
> We do not believe the District Court abused its discretion in denying plaintiff's request for additional time to respond to defendants' motion for summary judgment. **Discovery was complete as of December 24, 1987. Plaintiff had all discovery available to him to respond to defendants' motion for summary judgment even though certain transcripts were delivered to him late and one was not yet delivered. Despite knowing the substance of the deposition testimony for more than two months, plaintiff filed no response to the motion....**
> (Emphasis added)

Petitioner has timely filed this petition for Writ of Certiorari. The United States Supreme Court must now grant this Writ to ensure that petitioner is afforded justice, that in the future attorneys practicing within the jurisdiction of the

Sixth Circuit are not held to the outrageous standard set forth by the Sixth Circuit in this matter and are not forced to violate standard rules of ethics to comply with said outrageous standard, and that the integrity of and the public confidence in the federal judicial system is not undermined by said outrageous standard.

ARGUMENTS FOR GRANTING THIS WRIT

FIRST ARGUMENT

The opinion of the Sixth Circuit in this matter is contrary to opinions written by other circuits on the same subject matter. Thus, this Court must hear this case and resolve this conflict within the circuits.

Such a resolution would serve to inform attorneys practicing in federal courts as to when, if ever, the federal courts are required to grant non-movants additional

time to secure and to present evidence to the court in response to a motion for summary judgment, and specifically what type of evidence is required under Fed. R. 56 to counter a motion for summary judgment.

An affidavit made in support of a motion for a continuance to respond to a pending motion for summary judgment must contain sworn facts explaining why the non-movant cannot then present sworn facts which refute the merits of the motion for summary judgment. Beckers v. International Snowmobile Ind. U.S. Assn., 581 F.2d 1308, 1311 (8th Cir. 1978). This is so even where non-movant possesses no clear idea at the time the response is due as to which facts he may procure through the discovery process. Toebelman v. Missouri-Kansas Pipe Line Co., 130 F.2d 1016 (3rd Cir. 1942).

Such an approach comports with the purpose underlying Fed. R. Civ. P. 56 (f) to provide an additional safeguard against an unwise or premature granting of summary judgment to ensure that, where appropriate, cases are decided on their merits. Season-All Indus., Inc. v. Turkiye Sise Ve Cam Fabrikalari, A.S., 425 F.2d 34 (3rd Cir. 1970); Whitaker v. Coleman, 115 F.2d 305 (5th Cir. 1941).

It is an abuse of discretion to deny a Rule 56 (f) motion where, as here, the delay in finishing discovery necessary to refute the pending motion could have been avoided by the district court promptly ruling on pending discovery related motions. Patty Precision v. Brown & Sharpe Mfg. Co., 742 F.2d 1260, 1265 (10th Cir. 1984). This is especially so where, as here, the non-movant was not totally forthcoming in responding to non-movant's

discovery requests. Glen Eden Hosp., Inc. v. Blue Cross & Blue Shield of Michigan, Inc., 740 F.2d 423 (6th Cir. 1984).

In this case the district court refused to rule on petitioner's two Rule 56 (f) and 6 (b) motions from April 27, 1977 until November 30, 1977. The respondent refused to produce the deponents during this period.

After the district court finally granted petitioner an additional eight business days to prepare for and take seven complex depositions, procure the transcriptions of the thousands of pages of deposition testimony, permit the deponents 30 days to review and sign the depositions, read and review the contents of the transcripts, and prepare a brief in opposition to the motion for summary judgment, respondents filed a motion for protective order to

further complicate the discovery process.

Clearly, to this point in time, the reasons that petitioner was unable to prepare and to file a response to the motion for summary judgment were that respondents had not cooperated with providing discovery and the court had failed to rule on not one, but two motions to extend the discovery cut-off.

On December 10, 1987, the court ordered that petitioner complete discovery by or before December 24, 1992 and prepare and file his opposition to the motion for summary judgment by or before February 29, 1988. Immediately, petitioner began working feverishly to take the numerous depositions during the following two weeks. Petitioner ordered each deposition transcript after the respective deposition was completed.

Unfortunately, the small court reporter firm transcribing the deposition transcripts was unable to complete the transcription process in time to permit the deponents thirty days to review and to sign the depositions so that they could be filed with the court in response to the motion for summary judgment. Indeed, two of the depositions were completed on February 28, 1988 and one crucial deposition of one of the respondents had not been completed by the due date.

An affidavit of the owner of the court reporter firm was attached as an exhibit to petitioner's Rule 56 (f) motion setting forth all of the above. Also attached to said motion was an affidavit of one of petitioner's counsel in which it was averred that the deposition testimony was necessary to prepare and to file a meaningful response to the motion for

summary judgment.

These affidavits contained sworn, compelling facts explaining why petitioner could not then present sworn facts to counter the motion for summary judgment. Beckers v. International Snowmobile Ind. U.S. Assn., supra. Thus, these affidavits were sufficient for purposes of Rule 56 (f), and the district court abused its discretion by not granting petitioner additional time to present evidence to the court to counter the pending motion for summary judgment and to ensure that this case be decided on its merits. Season-All Indus., Inc. v. Turkiye Sise Ve Cam Fabrikalari, A.S., supra; Whitaker v. Coleman, supra.

Contrary to the authority cited above from the third, fifth, eighth and tenth circuits, the Sixth Circuit affirmed the district court's decision denying

petitioner's Rule 56 (f) and 6 (b) motion and granting the unopposed motion for summary judgment. This Court must hear this case to determine which of these circuits is correct and to offer guidance to attorneys seeking continuances to respond to motions for summary judgment under circumstances where, as here, the non-movant is not able by the due date to present his evidence to counter the motion for summary judgment.

SECOND ARGUMENT

On page 3 of its opinion the Sixth Circuit noted that petitioner's counsel could have responded to the motion for summary judgment by filing his own "affidavit stating the substance of the testimony that was given, even though he could not cite to specific transcript pages." This Court must hear this case to decide whether, under Fed. R. 56 (c) and

56 (e) and this Court's pronouncements in Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed. 2d 265 (1986), an affidavit from an attorney representing a party required to respond to a motion for summary judgment can constitute competent evidence to be presented in opposition to a motion for summary judgment.

Fed. R. 56 (c) sets forth the type of evidence which must be presented to support or to refute a motion for summary judgment. The rule requires in relevant part that "depositions" and "affidavits" be filed. Fed. R. 56 (e) states in relevant part that "opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein...."

Clearly, these rules do not allow a party to support or to refute a motion for summary judgment with affidavits of attorneys setting forth what the attorneys recall the deposition testimony of parties and key witnesses to be. Such testimony would be hearsay, not based on personal knowledge, not admissible in evidence, and in total contravention of the spirit and express language of the aforementioned federal rules.

THIRD ARGUMENT

The Sixth Circuit's pronouncement that petitioner's counsel could have filed his own affidavit to counter the motion for summary judgment runs contrary to the Code Of Professional Responsibility for attorneys practicing law in Ohio. Disciplinary Rules 5-101 and 5-102 require attorneys to avoid serving as an attorney and a witness in the same case.

Canon 5 states that "(a) lawyer should exercise independent professional judgment on behalf of a client." It is dangerous to place an attorney in a position which requires him to be both an advocate and a witness. This is especially so where, as here, the extent of the attorney's financial recovery depends, in part, on whether his client prevails in the action.

To require attorneys to counter motions for summary judgment with their own affidavits where, as here, the deposition transcripts have not been completed by the court reporter, will also serve to undermine the integrity of and public confidence in the federal judicial system. The federal judicial system relies heavily on neutral, trained court reporters to accurately transcribe testimony taken at depositions, trial, and evidentiary hearings. The opportunity for abuse on the

part of attorneys submitting to the court their own affidavits in lieu of court reporter prepared deposition transcripts is frightening.

Notwithstanding the potential for abuse, the chance for error under such an approach is great. For example, in this case, the Sixth Circuit reasoned that, two months after taking numerous lengthy and complicated depositions, petitioner's attorney could have sworn out an affidavit, based on notes which, because he was busy taking the deposition, were wholly incomplete, to detail for the court petitioner's opposition to the motion for summary judgment. Under these circumstances, it is highly unlikely that the affidavit would have been completely accurate. It is for the sake of accuracy that Fed. R. 56 requires the presentation and filing of deposition transcripts

prepared by skilled professional court reporters and which have been reviewed and signed by the deponents.

This Court must hear this matter and set forth standards under Rule 56 for responding to motions for summary judgment. Such standards will serve to inform attorneys as to exactly what evidence can be presented in response to a motion for summary judgment. More importantly, such standards shall clarify whether an attorney practicing in the Sixth Circuit should risk moving the district court for an extension of time to respond to a motion for summary judgment when deposition transcripts are unavailable (which may be denied) or violate ethical canons by acting as a witness and an attorney in the same case by filing an affidavit stating that to

which he believes key deponents testified at their depositions.

FOURTH ARGUMENT

This Court should hear this case to require that the Sixth Circuit follow its own clearly established rule that a district court must afford the party against whom sua sponte summary judgment is to be entered ten days notice and an adequate opportunity to respond. Kistner v. Califono, 579 F.2d 1004 (6th Cir. 1978); Jashon v. Gregory, 737 F.2d 547 (6th Cir. 1984).

In this case the district court order granting summary judgment was, in part, sua sponte, because it granted summary judgment on several counts contained in the complaint on grounds not requested or relied upon by respondents. Thus, the district court, at least as to these specific counts, should have afforded

petitioner ten days notice of its intentions in accordance with the Sixth Circuit's own rule. Since the rule has been adopted by the Sixth Circuit, the district court's failure to abide by it constitutes a denial of petitioner's due process rights to notice and a hearing.

CONCLUSION

In this case, the district court's denial of petitioner's Rule 56 (f) motion constituted an abuse of discretion, deprived the petitioner of the due process protections guaranteed to all United States citizens by the Fourteenth Amendment to the United States Constitution, and conflicted with prior decisions of Courts located in other circuits.

The opinion of the Sixth Circuit set forth a standard which required an attorney, where deposition transcripts had not yet been completed by the court reporter prior to the due date, to support his client's opposition to the pending motion for summary judgment with his own affidavit which set forth what he believed

the unavailable deposition testimony to be.

This standard is unwise and dangerous in that it creates the possibility for abuse and/or error, and, in so doing, undermines the integrity of and public confidence in the federal judicial system. This Court should hear this case to correct the injustice done to petitioner and to clarify for attorneys practicing in the Sixth Circuit what is required of them when responding to motions for summary judgment.

Respectfully submitted,

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APPENDICES

APPENDIX A-1, SIXTH CIRCUIT ORDER DENYING PETITION FOR REHEARING AND REHEARING EN BANC, ENTERED ON AUGUST 28, 1992.

APPENDIX A-2, SIXTH CIRCUIT OPINION AFFIRMING DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT, ENTERED ON JULY 13, 1992.

APPENDIX A-3, DECISION OF UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION GRANTING SUMMARY JUDGMENT, ENTERED ON SEPTEMBER 12, 1991.

APPENDIX A-1

No. 91-3963

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

NWABUEZE V. OKOCHA, Plaintiff-Appellant, v. CASE WESTERN RESERVE UNIVERSITY, ET AL., Defendants-Appellants,	)	ORDER FILED AUG 28, 1992

BEFORE: KENNEDY and NORRIS, Circuit Judges; and LIVELY, Senior Circuit Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

_____

Leonard Green, Clerk

APPENDIX A-2

No. 91-3963

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

NWABUEZE V. OKOCHA,

Plaintiff-Appellant,

v.

CASE WESTERN RESERVE UNIVERSITY; DR. JACK L. KOENIG; DR. JEROME B. LANDO; DR. HUGH DR. LUCILLE S. MAYNE; ALLEN HOLMES; DR. DAVID V. RAGONE, Individually and In Their Official Capacities,

Defendants-Appellees.

On Appeal from the United States District Court for the Northern BROWN; District of Ohio (FILED JUL 13 1992)

BEFORE: KENNEDY and NORRIS, Circuit Judges; and LIVELY, Senior Circuit Judge

PER CURIAM: Plaintiff Nwabueze V. Okocha brought this action against Case Western Reserve University and several

employees of Case Western in their individual and official capacities alleging that he was discriminated against on the basis of race and alienage. Plaintiff appeals the District Court's denial of its motion for an extension of time to respond to defendants' motion for summary judgment. For the following reasons, we AFFIRM the District Court.

I.

Plaintiff filed his complaint on May 8, 1986 which was amended on May 28, 1986 to set forth fifteen causes of action. On February 17, 1987, the defendants filed a motion for summary judgment. Plaintiff filed a motion on March 6, 1987 requesting more time to respond to defendants' motion because he claimed that defendants had failed to comply with discovery requests. On April 27, 1987, plaintiff moved to extend the period for discovery to August

31, 1987 because plaintiff had new counsel and because two defendants were on vacation and their depositions could not be taken. The District Court did not rule on this motion. Plaintiff took depositions on May 6 and 27, 1987, and then conducted no further discovery. On November 12, 1987, plaintiff filed a request to extend discovery to November 31 (sic), 1987. The District Court granted plaintiff an extension of time until December 11, 1987 to complete discovery and to respond to defendants' motion for summary judgment. After a discovery conference on December 9, 1987, the District Court extended the discovery deadline to December 24, 1987 and plaintiff's deadline to respond to defendants' motion for summary judgment to February 29, 1988, and stated that there would be no further extensions of time.

On February 29, 1988, plaintiff requested additional time to respond to defendants' motion. Plaintiff requested this extra time pursuant to Fed. R. Civ. P. 56(f) and 6(b) because he did not receive two deposition transcripts from his court reporting service until February 28th, and had yet to receive one deposition transcript. The District Court denied this motion. The deposition transcripts have never been filed.

On September 12, 1991, the District Court granted defendants' motion for summary judgment and dismissed the case. Plaintiff appeals the District Court's denial of his February 29, 1988 motion for an extension of time.

II.

Pursuant to Fed. R. Civ. P. 6(b), a district court may, at its discretion, grant an extension of time to file a

response to a motion for summary judgment. Plaintiff argues that the District Court should have granted his motion for such an extension. Plaintiff argues that he was unable to respond to defendants' motion because he did not receive transcripts of the depositions of Dr. Jack Koenig and Barbara Leach until February 28, 1988, and as of February 29, 1988, had not received the deposition transcript of Dr. Jerome Lando. Plaintiff argues that his response to defendants' motion could not be completed without these transcripts. Plaintiff's counsel was present at these depositions. Yet, plaintiff did not file any response, which could have included counsel's affidavit stating the substance of the testimony that was given, even though he could not cite to specific transcript pages. Plaintiff never filed the completed transcripts with the

District Court and never filed a response to defendants' motion for summary judgment. Plaintiff did not move for reconsideration of the order denying extension of the February 29, 1988 deadline. Plaintiff did not file anything further in this case until he filed a notice of appeal on October 10, 1991.

We do not believe the District Court abused its discretion in denying plaintiff's requests for additional time to respond to defendants' motion for summary judgment. Discovery was complete as of December 24, 1987. Plaintiff had all discovery available to him to respond to defendants' motion for summary judgment even though certain transcripts were delivered to him late and one was not yet delivered. Despite knowing the substance of the deposition testimony for ore than two months, plaintiff filed no response to

the motion. He merely filed an affidavit of the court reporter that she had been unable to complete the transcription and a motion for additional time to file a response. Nothing was said about what it was in the depositions that was needed for a response.

Plaintiff filed a motion on December 2, 1991 to supplement the appellate record to include these three depositions. This Court denied the motion without prejudice to resubmit if the District court denied the motion to supplement. On May 11, 1992, plaintiff filed a motion to postpone oral argument because the District Court had not ruled on the motion to supplement the record. This motion was denied on May 22,1992. Even if a renewed motion to supplement is to be considered, no purpose would be served by now supplementing the record. Since we are reviewing the

District Court's order denying additional time under an abuse of discretion standard and the depositions were not before the District Court, expansion of the record will not aid our decision.

The District court's order is AFFIRMED.

APPENDIX A-3

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

NWABUEZE V. OKOCHA	)	CASE NO. 86CV1941
	)	
Plaintiff	)	
	)	
v.	)	JUDGE ALICE M. BATCHELDER
	)	
CASE WESTER RESERVE UNIVERSITY, et al.	)	
	)	
Defendants	)	

O R D E R

This matter is before the Court on the unopposed motion of defendants for summary judgment. On review of the Complaint, the motion and the affidavits and supporting documentation, the court finds that there are no facts in dispute, and that, for the reasons which follow, defendants are clearly entitled to judgment on each of the claims of the Complaint.

1. Plaintiff's claims of discrimination on the basis of race and alienage, brought pursuant to 42 U.S.C. 1981, conspiracy to discriminate on the basis of race, brought pursuant to 42 U.S.C. 1985, and to the extent that they are not encompassed by the 1981 and 1985 claims, his claim that his constitutional and civil rights were violated by defendants all fail on the merits. It is clear from the evidence presented by the defendants not only that plaintiff cannot state a claim cognizable under 1981, but plaintiff was not the victim of discrimination of any kind; rather, plaintiff wholly failed to perform academically as he was required to do in order to continue in the program in which he was enrolled at Case Western Reserve University. Claims two, four, and ten must therefore be dismissed.

2. Plaintiff's claim of fraud regarding the denial of student aid is time-barred, and in addition, this claim is wholly without foundation, as is clear from defendants' affidavits. Claim three must be dismissed.

3. Plaintiff's claim for supervisory negligence is wholly unsupported as is demonstrated by the evidence presented in support of the motion for summary judgment. Claim five must be dismissed.

4. Plaintiff's claim for breach of fiduciary duty is wholly without foundation. Furthermore, the evidence is clear that plaintiff's academic dismissal was entirely attributable to plaintiff's dismal academic performance. Claim six must be dismissed.

5. Plaintiff's claim under the Ohio consumer Sales Practices Act fails to

state a claim for which relief may be granted. Claim seven must be dismissed.

6. Plaintiff's claim of undue influence fails to state a claim for which relief may be granted, and, in any event, the evidence is clear that no undue influence of any kind was exercised by or over anyone involved in plaintiff's academic dismissal. Claim eight must be dismissed.

7. Plaintiff's claim for breach of contract is wholly unsupported. The evidence is clear that the defendants did not breach any contractual relationship with plaintiff.

8. Plaintiff's claim for invasion of privacy is both time-barred, and wholly without foundation, as demonstrated by the documentation supporting the motion for summary judgment. Claim eleven must be dismissed.

9. Plaintiff's claim for conversion is without merit. The affidavits of defendants clearly demonstrate that any work performed by plaintiff under the direction of the University (and the evidence demonstrates that indeed precious little work was performed by him) was the property of the University. Claim twelve must be dismissed.

10. The evidence demonstrates that there were no express warranties made to plaintiff by any of the defendants. The claim for breach of express warranty is without merit. Claim thirteen must be dismissed.

11. The evidence demonstrates that there was no infliction of emotional distress by the defendants upon the plaintiff. To the extent that the plaintiff may have suffered any such distress, it is clear that defendants dealt with him as genteely

and as courteously as could have been required of them. Plaintiff's claim for intentional infliction of emotional distress is without merit. Claim fourteen must be dismissed.

12. Plaintiff's estoppel claim is wholly without merit and therefore Claim fifteen must be dismissed.

For all of these reasons, the defendants' motion for summary judgment is GRANTED. The first claim of the amended complaint having been voluntarily dismissed, and all other pending motions having been rendered moot by this Order, this case is DISMISSED.

IT IS SO ORDERED.

Dated this 12th day of September, 1991.

ALICE M. BATCHELDER
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

NWABUEZE V. OKOCHA	)	CASE NO. 86CV1941
	)	
Plaintiff	)	
	)	
v.	)	JUDGE ALICE M.
	)	
CASE WESTERN RESERVE	)	BATCHELDER
	)	
UNIVERSITY, et al.	)	
	)	
Defendants	)	

O R D E R

A Memorandum of Decision having been issued this date, for the reasons stated therein the unopposed motion of all defendants for summary judgment is GRANTED, all other pending motions herein are MOOT, and this case is DISMISSED.

IT IS SO ORDERED.

Dated this 12th day of September, 1991.

ALICE M. BATCHELDER

UNITED STATES

DISTRICT JUDGE